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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 385

PUERTO RICO TELEPHONE COMPANY,
Petitioner,

vs.

ROSA M. FIGUEROA DE ARROYO, IRIS TORRES DE HERNANDEZ, ANDREA COLON TUBENS, IRIS TRABAL QUINTANA, JOSE A. FRANQUI, LUZ ARMINDA TORO TIRADO, BENJAMIN TORRES RIVERA, CARMEN E. DE LA ROSA DE ORTIZ, ELSIE TORRES RAMOS, ALFREDO MOREU IRIZARRY, ELSIE LUGO BERNIER,

AND

SINDICATO DE TRABAJADORES PACKINGHOUSE, AFL-CIO, DISTRITO DE PUERTO RICO AND UNION DE EMPLEADOS DE LA INDUSTRIA DEL TELEFONO DE PUERTO RICO, LOCAL 963,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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PUERTO RICO TELEPHONE COMPANY,

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioner, Puerto Rico Telephone Company, petitions for a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the First Circuit entered in this case on April 17, 1970.

OPINIONS BELOW.

The opinion of the Court of Appeals, entered April 17, 1970, printed in Appendix A, has not, as yet, been officially reported. The opinion of District Court for Puerto Rico, entered August 8, 1969, printed in Appendix B, is reported at 302 F. Supp. 224 (D. P. R. 1969).

JURISDICTION.

The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Did a Union breach its duty of fair representation by failing to process grievances through the contractual grievance procedure, even though it pursued numerous alternative avenues of redress and, as was found by the Court of Appeals below, the Union was at no time motivated by hostility, bad faith, discrimination or dishonesty?

2. Even assuming a Union has breached its duty of fair representation, in the absence of hostility, by failing to process grievances protesting employee discharges, what is the appropriate remedy where, as was found by the Court of Appeals below, the Employer did not frustrate the grievance procedure and the question of contractual violation is a "close one?"

3. What is the appropriate statute of limitations in a § 301 suit where both breach of the Union's duty of fair representation and breach by the Employer of the collective bargaining contract must be proven?

STATUTES INVOLVED.

The statutes involved in this case, printed in pertinent part in Appendix C, are Sections 203(d), 301(a), and 10(b) of the National Labor Relations Act, as amended, 29 U. S. C. §§ 173(d), 185(a), 160(b), and three Puerto Rican statutes, 31 LPRA §§ 5141, 5298, 5294.

STATEMENT OF THE CASE.

The Case in a Nutshell.

Union leader Armando Sanchez was vitally interested in saving the jobs of all his members who were employed by Puerto Rico Telephone Company. The Company employed many of Sanchez' members. In fact, it employed too many. Faced with a mammoth task of expansion requiring the services of numerous subcontractors and, at the same time horribly overstaffed, the Company evaluated employee performance and determined which employees to retain and which to let go. The Company stood willing to process all grievances through the contractual grievance procedure.

Faced with hundreds of employee terminations, Sanchez and his Union first used the grievance procedure to obtain reinstatement of all, but were hampered by its weak provisions; and they realized that, even if successful under the seniority article, the result would not be reinstatement of all, but only substitution of junior employees for senior employees who had been terminated. Sanchez turned to the Puerto Rico Department of Labor and to the Puerto Rico Senate Labor Committee without success. The Union twice resorted to the Puerto Rico Labor Relations Board. Both cases were appealed to the Puerto Rico Supreme Court which declared that the processes of the National Labor Relations Board, and the charges that the Union had also

filed with that agency, were the Union's best hope. Indeed, that is also what Sanchez' lawyers told him, and he nurtured his Union's case with success through the Trial Examiner's decision and the Board, only to meet failure before the Court of Appeals. In taking these actions, Sanchez was supported, in fact encouraged, by the Plaintiffs in this case.

Following a § 301 suit brought by Plaintiffs, several of the discharged employees, the First Circuit found that the Union's efforts were, indeed, undertaken in good faith and without hostility, but because of the Union's failure to use the grievance procedure it did not fulfill its duty to fairly represent six of them.

As to these six, it was a jury, and not an arbitrator, which found, in what the Court of Appeals characterized as a "close" case, that the Company breached the seniority article of the contract by discharging them and retaining less senior employees.

The First Circuit also found that a one-year tort statute of limitations immunized the Union from liability, and it shifted the entire liability to the Company, though damages were previously allocated by the jury between the Company and the Union.

The Court of Appeals reached this result even though it admitted that the Company had done nothing to frustrate the grievance procedure, and conceded that even if the Union had processed these grievances, Plaintiffs would likely have ended up with nothing.

The Case in Detail.

In late 1958, the Puerto Rico Telephone Company commenced a major reorganization and modernization program mandated by the Puerto Rico Public Service Com-

mission (JA 316).[1] Since the Company could not possibly carry out this program in the allotted time with its regular work force, it employed numerous subcontractors (359 F. 2d at 985). During this program, a manpower study indicated that the Company was "horribly overstaffed,"[2] (149 NLRB at 956), and given the refusal of the Public Service Commission in June 1962, to grant a rate increase, the Company concluded that a personnel reduction was necessary (359 F. 2d at 986).

The dismissals began on November 9, 1962, and by March 3, 1963, the Company had terminated 227 employees (JA 318). During this period, the Union[3] initiated grievance discussions with the Company (JA 251), charging that the subcontracting was eliminating employees (149 NLRB at 956-957) and demanding their reinstatement (JA 181). As a result, some employees were reinstated, but were subsequently released during later rounds of dismissals (JA 181).

Union President Armando Sanchez followed up the grievance discussions with direct communications to the Company president and the Governor of Puerto Rico (JA 181-182, 328), by personally going to the Puerto Rico

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* The abbreviation "JA" refers to the Joint Appendix, which was filed with the Court of Appeals and which is a part of the certified record in this case.

1. *Puerto Rico Telephone Co.*, 149 NLRB 950, 952-956 (1964), enforced in part, set aside in part, *Puerto Rico Telephone Co.* v. *NLRB*, 359 F. 2d 983 (1st Cir. 1966).

2. Compared to the Bell System and General Telephone, the Puerto Rico Telephone Company employed three times as many employees per thousand stations (149 NLRB at 956 n. 18).

3. The Company's employees were represented by Sindicato de Trabajadores Packinghouse, United Packinghouse, Food & Allied Workers District 9 of Puerto Rico, AFL-CIO, and its affiliate Union de Empleados de la Industria del Telefono de Puerto Rico, Local 963 (hereinafter referred to as the "Union"), which was also a Defendant in the case below.

Department of Labor and requesting the intervention of the Secretary of Labor (JA 185) and by taking the dispute to the Puerto Rico Senate Labor Committee, which undertook an investigation of the matter (JA 185-186).

In March 1963, further grievance meetings were held, but resulted in impasse (149 NLRB at 958-959). The Union then filed charges against the Company with the National Labor Relations Board[4] on March 8, 1963, and submitted amended charges on March 20 and August 15 of that same year, contesting, *inter alia*, the Company's subcontracting and its simultaneous mass dismissal of employees (149 NLRB at 951). On August 15, 1963, the Board's General Counsel issued a complaint, charging the Company with violations of §§ 8(a)(3) and (1) of the National Labor Relations Act, as amended (hereinafter referred to as NLRA) (149 NLRB at 951).

In October 1963, following dismissal of 43 more employees,[5] the Union once again called for resumption of grievance committee meetings (JA 207-209). After three days of discussion, these proceedings ended in impasse, with the questions of the dismissals, and the propriety of intervention by a conciliator unresolved (JA 209, 337-338, 349-350).

A few days later, the Union filed a charge with the Puerto Rico Labor Board, alleging the Company had violated the collective bargaining agreement and, subsequently, on November 20, 1963, a complaint against the Company was issued by the Insular Board (JA 339-340).

4. The Union also turned to the Puerto Rico Labor Relations Board to undertake contempt proceedings against the Company for violation of a 1960 decree enjoining violations of the collective bargaining agreement (149 NLRB at 959). Such a motion was filed with the Court, but was denied on May 10, 1963, and on reconsideration the Court adhered to this ruling (149 NLRB at 959).

5. Among the 43 was Plaintiff Elsie Lugo Bernier (JA 208).

During this time, hearings were held before an NLRB Trial Examiner, culminating in a Decision on February 3, 1964, which was adopted by the NLRB on November 20, 1964 (149 NLRB 950; see Appendix D for full text). The Trial Examiner found that the Company violated Sections 8(a)(5) and (1) of the NLRA by its subcontracting and by its failure to furnish the Union with certain requested information (149 NLRB at 969). Reinstatement of all employees laid off "as a result of [the Company's] unlawful action" and the furnishing of the requested information were ordered (149 NLRB at 969-970). The Trial Examiner determined that the question of which specific employees were unlawfully terminated would be decided in subsequent compliance proceedings (149 NLRB at 968).

In the Insular Labor Board proceedings, a hearing was held on December 12, 1963, after which a trial examiner, subsequently affirmed by the full Board, found the Company had violated Article 8(1)(f) of the Puerto Rico Labor Relations Act by refusing assistance of the conciliation service at grievance meetings (JA 348). This decision was appealed to the Supreme Court of Puerto Rico, which, in its decision rendered April 13, 1965, (see Appendix E for full text), acknowledged the nature and status of the NLRB proceedings which had, at that stage, culminated in a broad remedial order. The Court held:

> "Even if it were true that the Local Board had authority under the law to intervene in the presence of a breach of contract for refusal to use the Conciliation Service, the record shows that *the alleged violation involved a minor incident that was an inseparable part of the basic problem already under consideration by the National Labor Relations Board.* We believe that under such circumstances, even if there was authority, that the best policy should have been for the Local Board to abstain using it in exer-

cise of the discretion with which it is invested as the agency in charge of labor relations." (JA 355.) (Emphasis added.)

The Order of the NLRB was appealed to the Court of Appeals for the First Circuit, which, on April 27, 1966, entered a decree enforcing only that part of the Board's order relating to the Company's refusal to furnish the Union with information (359 F. 2d 983, 988; see Appendix F for full text).[6]

Plaintiffs in this case are seven[7] former telephone operators at the Company's Mayaguez installation. Six were dismissed on April 3, 1964 (JA 41, 56, 64, 73, 80). Elsie Lugo Bernier was dismissed several months earlier, on September 19, 1963 (JA 50). All seven received form letters, identical to those given hundreds of other discharged employees, explaining that their dismissals were "due to a reorganization" (JA 169, 193, 335).

After receiving notice of termination, two of the Plaintiffs ultimately contacted Sanchez (JA 58, 64, 75). Both received similar responses from Sanchez, who referred to the favorable NLRB Trial Examiner's decision and his belief that they would be better protected by the Board's processes than by any other means and that it would be best to await the final outcome of that proceeding (JA 58, 64-65, 67-68, 195).

This decision to rely on NLRB processes was made by Sanchez with several factors in mind. First, it was made in accord with the advice of counsel (JA 187), which was but-

6. Such information was later supplied by the Company. (JA 35-36).

7. Of the original eleven plaintiffs, the cases of two—Iris Torres de Hernandez and Benjamin Torres Rivera—were dismissed by the District Court for lack of jurisdiction, and two others—Jose A. Franqui and Alfredo Moreu Irizarry—had directed verdicts entered against them by the District Court (302 F. Supp. at 226).

tressed by the Trial Examiner's finding that the Company's subcontracting had a "profound impact on the unit work and the unit employees" and his simultaneous rejection of the Company's contention that there were reasons, other than subcontracting, for the dismissals[8] (149 NLRB at 962). Second, the Union's consistent position was to try to get all employees reinstated and reliance on the seniority provisions of the contract, even if successful, would merely have substituted junior employees for senior ones among the discharged (JA 189). Third, Sanchez had little success utilizing the grievance procedure and what success he did have, with the reinstatement of several employees, was short lived when these employees were subsequently discharged (JA 181). Fourth, Sanchez, who negotiated the contract with the Company (JA 126), believed that its seniority provisions were not strong (JA 183), and knew from prior experience that the grievance procedure presented a long and arduous course for redress (JA 189). In sum, Sanchez believed that given the favorable Trial Examiner's decision and its broad remedial order, the Board's processes were his Union's best hope, a conclusion shared not only by his attorneys but also by no less an authority than the Supreme Court of Puerto Rico (JA 339-357).

Indeed, Plaintiffs seemed to share that same conclusion. There is no evidence in the record that any Plaintiff ever differed with Sanchez' view and requested that a grievance be processed. On the contrary, Jose Arroyo, Rosa Figueroa's husband, met with Sanchez, as a representative of the dismissed telephone operators (JA 201, 205) and discussed the litigation before the NLRB (JA

8. The Trial Examiner noted, 149 NLRB at 962 n. 37:

"Respondent did not adduce evidence supporting Neff's conclusionary testimony concerning the 'overstaffing.' There is no evidence that the particular laid-off employees worked in an 'overstaffed' department or unit—evidence peculiarly within Respondent's possession."

194-195). Sanchez, in response to a question, stated his belief that all of the cases were similar in that they were part of a mass dismissal campaign undertaken by the Company" (JA 194). Arroyo agreed and later communicated in February and March 1965, with both Union counsel and Union President Sanchez with a request that the claim of his wife and others "be included in the claim against the Puerto Rico Telephone Company." (JA 195-198).

Plaintiffs, in a complaint[9] filed on November 22, 1965 (as amended August 11, 1966), alleged that the Union had breached its duty of fair representation by failing to prosecute their grievances and that the Company had wrongfully dismissed them contrary to the seniority provisions of the collective bargaining agreement and prayed for the processing of such grievances and for damages (JA 6-11). Both Defendants denied the allegations and countered that the appropriate remedy, in any event, was resort to the grievance procedure (JA 12-32, 40).

Separate jury trials were held. The first jury found, on evidence characterized by the Court of Appeals as "admittedly not so specific or precise as we should like," that the Company's dismissal of Plaintiffs had violated the seniority provisions of the contract and that Plaintiffs had properly submitted their claims to the Union. The second jury was asked to decide whether or not the Union had breached its duty of fair representation. The jury was first told by the Court that "each Plaintiff had a just grievance against the Company" (JA 242) and then was instructed (JA 245):

> "[The Contract] provides that if the Union regards an employee's 'suspension or laying-off as unjust' it shall submit the grievance to the Company in accord with [contractual grievance procedures].

9. Jurisdiction against the Company was based on § 301(a) of the National Labor Relations Act, as amended, 29 U. S. C. § 185(a), and based against the Union on 28 U. S. C. §§ 1331, 1337.

"... the Union is not required to submit to the Company all grievances of its members relating to layoffs. *It is only required to submit such of those grievances which it regards as just grievances.*" (Emphasis added.)

Numerous instructions offered by both the Union and the Company dealing in detail with the issue of the Union's duty of fair representation were rejected (JA 227-235, 239, 241).

The second jury found that the Union had breached its duty of fair representation and awarded Plaintiffs varying amounts for damages, allocated between the Company and the Union. Post-trial motions by both Defendants were denied (302 F. Supp. at 233).

The Court of Appeals for the First Circuit found that while there was no evidence of hostility, and, in fact, specific evidence to the contrary, the Union breached its duty of fair representation toward six Plaintiffs by its "arbitrary and perfunctory handling of ... apparently meritorious grievance(s)." Plaintiff Elsie Lugo Bernier's claim was dismissed by the Court on the ground "that the Union pressed her grievance to impasse immediately after her dismissal in September 1963."

The Court also found that the cause of action against the Union was barred by Puerto Rico's one-year statute of limitations for tort claims and that, in any event, damages against the Union were inappropriate since "there was no evidence that but for the Union's conduct the plaintiffs would have been reinstated or reimbursed at an earlier date. ..." It held, however, that the action against the Company was subject to Puerto Rico's 15-year statute of limitations for contract claims and that the Company was liable for all the damages previously allocated by the jury.

As for the breach of contract by the Company, although

the Court found the case to be "a close one," and, in fact, unsupported by evidence in regard to Rosa Figueroa, it found that there was "more than a scintilla" to support the jury verdict vis-a-vis the other five Plaintiffs. The Court concluded by noting that it could "find no substantial evidence that the Company could be said to have frustrated the grievance procedure with regard to plaintiffs still before us."

REASONS FOR GRANTING THE WRIT.

1. The Decision of the Court of Appeals as to What Constitutes a Breach of a Union's Duty of Fair Representation Conflicts With Decisions of This Court and Other Courts of Appeals.

The Court of Appeals in this case found a complete absence of hostile motivation by the Union. The Court noted:

> ". . . [W]e can rule out any possibility of subjective bad faith, hostility, discrimination, or dishonesty on the part of the Union officials in failing to press plaintiffs' grievances. Mr. Sanchez—the Union official who was responsible for the Union's action in this case—appears from the record as a dedicated Union leader and legislator of manifold responsibilities. . . ."

In spite of this, the First Circuit ruled that the Union violated its duty of fair representation by its "arbitrary and perfunctory handling . . . of apparently meritorious grievance(s). . . ." This holding conflicts with Court of Appeals decisions in the Third, Sixth and Ninth Circuits, numerous District Court and State Court decisions, NLRB cases, as well as rulings of this Court, that have held that only where hostility, bad faith or discrimination are shown does a Union breach its duty of fair representation.

Inexplicably, the First Circuit itself initially seemed to recognize that this Court required a showing of hostility as the *sine qua non* for breach:

> "*[T]he employee must prove arbitrary or bad faith conduct—variously referred to as the absence of honest purpose and judgment and or the presence of hostility or discrimination—on the part of the union in order to prove that it has breached its duty. Vaca v. Sipes,*

supra at 190, 193; *Humphrey* v. *Moore*, 375 U. S. 335, 349-350 (1964); *Ford Motor Co.* v. *Huffman*, 345 U. S. 330, 337-338 (1953)."

Such was the holding of this Court in *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192 (1944), where the duty of fair representation first arose. There, this Court held, 323 U. S. at 204:

> "While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership, it does require the union, in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith."

This holding was reiterated in *Ford Motor Co.* v. *Huffman*, 345 U. S. 330, 338 (1953), where this Court said:

> "A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion."

And it was repeated again in *Humphrey* v. *Moore*, 375 U. S. 335, 342 (1964):

> "The exclusive agent's obligation 'to represent all members of an appropriate unit requires [it] to make an honest effort to serve the interests of all of those members, without hostility to any. * * *' and its powers are 'subject always to complete good faith and honesty of purpose in the exercise of its discretion.' *Ford Motor Co.* v. *Huffman*, 345 U. S. 330, 337-338, 73 S. Ct. 681, 686, 97 L. Ed. 1048."

Various Courts of Appeals have held similarly. Directly on point is a decision of the Sixth Circuit, *St. Clair* v. *Local Union No. 515, International Brotherhood of Teamsters*, 422 F. 2d 128 (6th Cir. 1969). There, a Union's business

agent did little more than phone the Employer twice to protest the discharge of an employee. The employee claimed that the Union did not prosecute his grievance vigorously enough and brought a fair representation suit against the Union. The Sixth Circuit emphasized that the crucial question in a fair representation suit is the presence of bad faith and reversed the District Court's refusal to allow the Union to introduce certain evidence bearing on this issue. In so ruling, the Court held, 422 F. 2d at 131-132:

> "The relevant issue here is not whether the union acted incorrectly, but whether it acted in bad faith. *Vaca* v. *Sipes*, 386 U. S. 171, 192-194, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967). In determining bad faith, the jury must look through the eyes of the union and see whether there appeared to be reasons upon which the union in good faith relied not to prosecute St. Clair's grievance to the fullest extent."

This holding echoed a prior decision of the Sixth Circuit in *Bialowski* v. *International Union, UAW*, 372 F. 2d 829, 835 (6th Cir. 1967) that:

> "'. . . plaintiffs must make a showing that the action or inaction of the statutory representative complained of was motivated by bad faith, for the gravamen of the rule is 'hostile discrimination.'"

Accord, *Gray* v. *International Assoc. of Heat & Frost Insulators & Abestos Workers, Local No. 51*, 416 F. 2d 313 (6th Cir. 1969); *Sweeney* v. *Hiltebrant*, 373 F. 2d 491 (6th Cir. 1967).

The First Circuit decision is also at odds with holdings of the Third Circuit. Thus, in *Brady* v. *Trans World Airlines Inc.*, 401 F. 2d 87, 94 (3rd Cir. 1968), *cert. denied*, 394 U. S. 955 (1969), the Court held:

> ". . . it is now recognized that the statutory power

> conferred on unions imposes on them a corresponding duty which encompasses the prohibition of all forms of hostile discrimination."

Accord: *Nedd* v. *United Mine Workers of America*, 400 F. 2d 103, 105 (3rd Cir. 1968).

District Court cases also run counter to the First Circuit's decision. In *Brown* v. *Truck Drivers & Helpers Union No. 355*, 292 F. Supp. 125, 129 (D. Md. 1968), *aff'd.*, 416 F. 2d 1333 (4th Cir. 1969), it was held:

> "It is clear that in the absence of evidence of unfairness or dishonesty union procedures and policies are not subject to judicial attack."

Similarly, in *Gainey* v. *Brotherhood of Railway & Steamship Clerks*, 275 F. Supp. 292, 303 (E. D. Pa. 1967), *aff'd.*, 406 F. 2d 744 (3rd Cir. 1968), *cert. denied*, 394 U. S. 998 (1969), the Court noted that in a fair representation suit:

> "The issue is bad faith, not a mistake in judgment and not negligence."

And, in *Turley* v. *Hall's Motor Transit Co.*, 296 F. Supp. 1183, 1187 (M. D. Pa. 1969), the Court ruled:

> "Lack of good faith, improper motive or hostile discrimination are essential elements to be alleged in an action, under Section 301, by a member against his union."

The National Labor Relations Board, which under *Vaca* v. *Sipes*, 386 U. S. 171 (1967), has concurrent jurisdiction over fair representation cases, has likewise indicated that in such cases hostility is an essential prerequisite:

> "[The union] cannot be held to a standard of infallibility; [it] can be expected only to exercise honest judgment." *Local 485, I. U. E.*, 170 NLRB No. 121, TXD 18 (1968).

The highest courts of several states have also, contrary to the First Circuit, ruled that breach of a union's duty of fair representation occurs only when bad faith or hostility is shown. *See, e.g., Phalen* v. *Theatrical Protective Union No. 1*, 22 N. Y. 2d 34, 238 N. E. 2d 295, *cert. denied*, 393 U. S. 1000 (1968); *Ball* v. *Eastern Coal Corp.*, 415 S. W. 2d 620 (Ky. Ct. App. 1967).

Additionally, the First Circuit decision is in conflict with Ninth Circuit cases. Specifically, in *Hardcastle* v. *Western Greyhound Lines*, 303 F. 2d 182, 186 (9th Cir.) *cert. denied*, 371 U. S. 920 (1962), cited with approval by this Court in *Vaca* v. *Sipes*, 386 U. S. 171, 186 n. 11 (1967), the Ninth Circuit held:

> "The complaint herein alleged that [the Union's action] was 'arbitrary,' 'capricious' and 'unreasonable.' In *Colbert* v. *Brotherhood of Railway Trainmen* . . . this Court held that similar conclusory words ('arbitrary' capricious' and 'fraudulent') without a concomitant showing of lack of good faith did not set forth a claim."

Accord, Seay v. *McDonnell Douglas Corp.*, Docket No. 23,114, 120 Daily Labor Report D-1, D-2 (June 3, 1970) (9th Cir.)

Vaca, of course, noted that "a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion," 386 U. S. at 191; and it is this phrase alone that the First Circuit relied upon to devise a novel basis for establishing breach of duty of fair representation. It is submitted that the First Circuit's utilization of this single isolated phrase as the foundation for a finding of breach of that duty in the face of admitted good faith motivation constitutes an unwarranted distortion of the principles repeatedly enunciated by this Court.

There are, we submit, several possible bases for interpreting the phrase in question. First, it can be sug-

gested that by referring to arbitrary or perfunctory handling of employee complaints, this Court merely intended to enumerate typical manifestations of bad faith motivation.[10] Going one step further, it can be argued this Court was suggesting that, given evidence of arbitrary or perfunctory handling of complaints, it would be permissible for the trier of fact to infer bad faith motivation, absent evidence to the contrary. Either of these interpretations would, of course, preserve bad faith as an essential prerequisite to a finding of breach of duty of fair representation, and, given the specific finding of good faith in the instant case, the claim of breach of duty of fair representation would necessarily fail.

The foregoing interpretations can be supported by a number of considerations. Thus, as already noted, throughout the *Vaca* decision itself, there are numerous cases, cited with approval, holding that only where bad faith or hostility are present can a union breach its duty of fair representation. *See, e.g., Hardcastle* v. *Western Greyhound Lines, supra.* It would seem that if this Court intended to dispose of the requirement of bad faith in fair representation suits, thereby discarding all of the precedents which it cited with approval, it would not have done so in one cryptic phrase.

That bad faith is still a requisite element to a fair representation suit can be also gleaned from two other portions of this Court's opinion in *Vaca*. First, this Court noted that the Missouri Supreme Court erred in concentrating solely on the merits of Owens' grievance "regardless of the Union's good faith in reaching a contrary conclusion." 386 U. S. at 189-190. Second, this Court, consistent with a requirement of bad faith, refused to articulate any standard of due care in finding a breach of a

10. *Cf., Local 485, I. U. E.*, 170 NLRB No. 121 (1968); *Port Drum Co.*, 170 NLRB No. 51 (1968).

union's duty of fair representation for, as noted in *Vaca*, 386 U. S. at 192-193:

> ". . . if a union's decision that a particular grievance lacks sufficient merit to justify arbitration would constitute a breach of the duty of fair representation because a judge or jury later found the grievance meritorious, the union's incentive to settle such grievances short of arbitration would be seriously reduced. The dampening effect on the entire grievance procedure of this reduction of the union's freedom to settle claims in good faith would surely be substantial."

The only other possible explanation for the phrase in question is that this Court meant to devise a hitherto unknown standard for breach of the duty of fair representation; to wit, that, even absent bad faith or hostile motivation, a course of conduct by a union that completely ignores employee complaints or simply goes through the motions in processing them runs afoul of its statutory duty. But, even assuming, *arguendo*, the applicability of such a standard, no breach could be found here; for, as is clearly borne out by the facts in this proceeding, the Union did not ignore the complaints of these Plaintiffs, nor did it perfunctorily process them. Rather, the Union resorted to numerous forums to obtain reinstatement of all employees.

Admittedly, the Union did not pursue the grievance procedure in seeking redress for six Plaintiffs. But, to utilize this single fact as the basis for a finding of breach of duty, is to read the language in *Vaca* in its most unintended sense. For, if one thing is clear from this Court's opinion in *Vaca* it is that the "wide range of reasonableness" accorded to unions in *Ford Motor Co.* v. *Huffman*, *supra*, applies not only to the negotiating table but also to the handling of grievances. And, under *Vaca*, this means that a "Union is permitted to exercise its discretion in

prosecuting grievances." *Watson* v. *International Brotherhood of Teamsters*, 399 F. 2d 875 (5th Cir. 1968). Surely, this "discretion," this "wide range of reasonableness," allows a union to by-pass the grievance procedure and pursue remedies in other forums which it honestly believes will be more effective.[11]

A contrary ruling, and the First Circuit's decision, buttressed by the jury instructions here, is such, has ominous implications. For example, unions have increasingly eschewed contractual grievance procedures and turned instead to the NLRB for redress, utilizing §§ 8(a)(5) and 8(d), in cases that are arguably subject to the contractual grievance procedure. *See, e.g., Joseph Schlitz Brewing Co.*, 175 NLRB No. 23 (1969). But, under these jury instructions and the holding in this case, such conduct would constitute a breach of the Union's duty of fair representation.

Curiously, the District Court never instructed the jury on the issue of perfunctory handling of grievances, except to note that "arbitrary means to act perfunctorily" (JA 246), which is, to say the least, rather circular. The only instruction on the issue of the Union's breach of its duty of fair representation was that (JA 245):

> "[The contract] provides that if the Union regards an employee's 'suspension or laying-off as unjust' it shall submit the grievance to the Company in accord with [contractual grievance procedures].
>
> ". . . the Union is not required to submit to the Company all grievances of its members relating to layoffs. *It is only required to submit such of those grievances which it regards as just grievances.*" (Emphasis added.)

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11. Notably, the NLRB has recently intimated that a union can discharge its duty of fair representation by seeking redress for grievances in forums other than the contractual grievance procedure. *Local 485, I. U. E.*, 183 NLRB No. 131 (1970); *Port Drum Co.*, 180 NLRB No. 90 (1970).

This instruction, which was objected to at length before both the District Court and the Court of Appeals, in effect, says that it is *per se* arbitrary and hence a breach of the Union's duty of fair representation not to process a grievance the Union believes has merit. And since the jury had been instructed that these grievances were "just" (JA 242), it was, in effect, duty-bound by the instruction to find that the Union breached its duty of fair representation.

The critical flaw in this instruction is that it entirely missed the central problem of this case. The question which had to be resolved was not whether the Union regarded these grievances as just, but rather whether the Union's resort to alternative avenues of redress, in the face of the repeated failures it encountered utilizing the grievance procedure and acting on the advice of counsel, amounted to arbitrary, capricious or whimsical conduct.[12] The Court's instruction, which, like the Missouri instruction overturned in *Vaca*, concentrated on the merits of the grievance, foreclosed any objective determination of this central issue since, as this Court noted in *Vaca v. Sipes*, 386 U. S. at 195, "a breach of the duty of fair representation is not established merely by proof that the underlying grievance was meritorious."

Inexplicably, the Court of Appeals, while refusing to overturn the jury instructions, never grappled with them, but instead put its own gloss on the standard of arbitrariness in a footnote, which reads:

> "The defendant's argument that the charge erred in focusing solely on the Union's action in failing to process the grievances might have been well taken had there been any rational basis for relying solely on the NLRB proceeding."

12. The District Court defined "arbitrary" to mean "not governed by principle but acting according to preference, notion, whim or caprice." (JA 247.)

In so ruling, the First Circuit has now declared that since, as a matter of law viewed years later, the Union could not have obtained redress for these Plaintiffs in the forums it utilized, it therefore breached its duty of fair representation. In reaching this conclusion, despite what the Court conceded to be good faith motivation, the First Circuit has quite clearly equated honest mistake with a breach of duty; for in the context of good faith motivation and vigorous pursuit of redress, lack of a "'rational basis'' can only mean honest mistake. But, as already noted, such a standard was rejected by this Court in *Vaca*.

Moreover, it is hard to understand how the Court of Appeals ever reached this issue of "rational basis." The jury was never asked,[13] and indeed, from the instruction it was given, was effectively foreclosed from deciding whether there was a rational basis for the Union to believe that these dismissals would be covered by the National and Insular Board proceedings. More significantly, the jury was never asked the question of whether the Union in good faith believed that it had some rational basis for proceeding as it did; and, if the Union in good faith believed that these employees were indistinguishable from the hundreds of others that were dismissed, all having received identical dismissal letters, was there not a rational, non-arbitrary basis for reliance on the National and Insular Boards' processes?

Furthermore, the record is replete with evidence that the Union acted on advice of counsel[14] and honestly believed at the time that it could secure redress for these employees in the forums which it chose—a belief which was but-

13. A jury instruction to that effect was tendered by the Company, but rejected by the District Court (JA 241).

14. The parallel to *Vaca*, where the Union relied upon outside medical advice and was thereby insulated from a claim of breach of duty of fair representation, is striking.

tressed by the success enjoyed by the Union before the NLRB and the Insular Labor Board, and was shared by Plaintiffs themselves and by no less an authority than the Supreme Court of Puerto Rico. [15]

Finally, the Court of Appeals concluded that the Union did not breach its duty of fair representation vis-a-vis Plaintiff Elsie Lugo Bernier since it processed her grievance to impasse and the Court of Appeals thus dismissed her case. But, in concluding that the Union breached its duty to six other plaintiffs by not processing their grievances, the First Circuit reached an anomalous result. Its decision thus means that Plaintiffs in this case were not harmed by the Union's breach of its duty but are indeed better off, for had the Union processed these grievances through the grievance procedure, there is every reason to believe that these Plaintiffs would have fared no better than Elsie Lugo Bernier, and, in fact, the Court so stated.[16] Effectively, the Court of Appeals has found that the Union here breached its duty by not pursuing a remedy which was fruitless. This Court could hardly have intended that the doctrine of fair representation would achieve such absurd results.

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15. The action brought by the Union before the Puerto Rico Labor Relations Board was a § 301-type breach of contract action attacking all the Company's dismissals and seeking to compel compliance with contractual grievance procedures. Notably, in overturning the Insular Labor Board's cease and desist order, the Supreme Court of Puerto Rico was unable to discern whether employees were terminated as a result of subcontracting or automation. That tribunal expressed its opinion that all of the discharges and the questions of contract procedure related thereto, were "an inseparable part of the basic problem already under consideration by the National Labor Relations Board." (JA 355.)

16. The Court of Appeals held that "there was no evidence that but for the Union's conduct the Plaintiffs would have been reinstated or reimbursed at an earlier date."

2. The Remedy Found Appropriate in This Case Conflicts With Decisions of This Court and Raises Significant and Important Questions of National Labor Policy.

This Court has recognized numerous times the central role of the parties' grievance procedure in effectuating national labor policy. As was said by this Court in *Drake Bakeries, Inc.* v. *Local 50, American Bakery & Confectionary Workers International*, 370 U. S. 254, 263 (1962):

> ". . . The preferred method for settling disputes was declared by Congress to be '[f]inal adjustment by a method agreed upon by the parties' (§203(d) of the Act, 29 U. S. C. § 173(d), 29 U. S. C. A. § 173(d)). 'That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play' (*United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564, 566, 80 S. Ct. 1343, 1345, 4 L. Ed. 2d 1403). . . ."

Indeed, the contractual issue presented by this case—the abilities of junior employees compared to senior ones—was one of the provisions at issue in *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U. S. 564, 565-566 (1960). This Court held there, 363 U. S. at 568, 569:

> "The courts, therefore, have no business weighing the merits of the grievance, in considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim.
>
> * * * * * * *
>
> "When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under that regime is entrusted to the arbitration tribunal."

For these reasons, both Defendants urged that remission of these grievances to the contractual procedure was an appropriate remedy in this case. The District Court, however, let the jury decide the underlying contractual remedy and, although noting the question of breach of contract was "a close one,"[17] and that the evidence adduced was "admittedly not so specific or precise as we should like," the Court of Appeals affirmed for all Plaintiffs except Rosa Figueroa.[18] But as this Court emphasized in *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 582 (1960):

> "For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed."

If the ablest judge is incompetent to determine grievances, how can a jury's determination square with national labor policy?

The vice of having judges decide contractual issues is underscored by a portion of the Court of Appeals' decision

17. By the Court's own admission, the only evidence introduced by Plaintiffs on the issue relevant to contract violation was the testimony of a former supervisor, who had been one of the original Plaintiffs in the proceeding, and who (1) had been discharged seven months prior to Plaintiffs' terminations, during which time she had no opportunity to observe Plaintiffs' job performance or that of junior employees, and (2) relied heavily upon seniority standing as the basis for determining Plaintiffs' abilities in relation to those of junior employees.

18. Significantly, the First Circuit reviewed the merits of these grievances without reference to any arbitral authority, and the Court did not discuss the arbitral authority cited to it by Petitioner in its brief. This is contrary to the practice of the NLRB. *See, e.g., Local 485, I. U. E.*, 170 NLRB No. 121 (1968); *Port Drum Co.*, 170 NLRB No. 51 (1968).

which rejected as a "strained interpretation of the collective bargaining agreement" the Company's argument as to the procedural steps needed to be taken by an employee to process a grievance. But such an issue of procedural arbitrability is one specifically delegated to the arbitrator under this Court's decision in *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543, 555-559 (1964). In not deferring to arbitration on such an issue, this decision is also in conflict with a recent Ninth Circuit decision reversing a District Court's handling of such procedural issues. *Bealmer* v. *Texaco, Inc.*, Docket No. 23,632, 125 Daily Labor Report A-8, A-9 (June 29, 1970) (9th Cir.). Similarly, the Court's treatment conflicts with the NLRB's approach. *Local 485, I. U. E., supra.*

As the Employer in *Drake Bakeries, supra*, was deprived of resort to the Courts when the Union did not repudiate the grievance procedure and denied it breached its contract, so too an appropriate remedy here, where the Company has not repudiated the grievance procedure and denies it breached its contract, is to direct that these grievances be processed through the grievance procedure. This is all the more appropriate remedy where the contractual question is, as here, "a close one," and since there is no showing of Union hostility, there is little doubt that the grievances will be prosecuted with vigor. Indeed, the NLRB has held that where a union has breached its duty of fair representation by not processing grievances, resort to the grievance procedure is the appropriate remedy, even though the Board could interpret the contract. *Local 485, I. U. E., supra; Port Drum Co., supra.*

While not laying down a blanket rule requiring arbitration, this Court noted in *Vaca*, 386 U. S. at 196, that "an order compelling arbitration should be viewed as one of the available remedies when a breach of the union's duty is

proved." It is submitted that, in light of the dangers posed by not compelling arbitration here, arbitration is an appropriate remedy in this case. Further, the expanded definition of breach of the duty of fair representation provided by the First Circuit can only give rise to substantially increased litigation by disgruntled employees. Clearly, unless such claims are referred to arbitration, federal district courts could well become labor courts engaged in the wholesale litigation of contract disputes—a result hardly consistent with the thrust of this Court's decisions in the "Steelworkers Trilogy."

Finally, even assuming *arguendo* that the Courts below should have decided the contract and damage questions, the First Circuit erred in overturning the jury's apportionment of damages, an apportionment based upon clearly proper instructions (JA 248-249).[19]

The Court's apportionment of all damages against the Company, further, produces a shocking, inequitable result, given the facts in this proceeding. It should be noted that the Court attained this result despite its conclusions (1) that there was no evidence to indicate that the Company at any time frustrated the grievance procedure with respect to Plaintiffs; (2) that there was no evidence that but for the Union's conduct in failing to pursue the grievance procedure, "plaintiffs would have been reinstated or reimbursed;" (3) that plaintiff Elsie Lugo Bernier, for whom a grievance was unsuccessfully pursued, was entitled to no recovery from the Company; and (4) that the issue of adequacy of evidence to support a finding of contract violation by the Company vis-a-vis Plaintiffs "is a close one." Given these conclusions, the assessment of all damages

19. *See also, Local 485, I. U. E.*, 183 NLRB No. 131 (1970) and *Port Drum Co.*, 180 NLRB No. 90 (1970), where the NLRB assessed 100 per cent of the damages suffered by employees against the Union, even though such damages were occasioned by the employer's arguably wrongful discharge.

against the Company means, in effect, that a company which enters into a labor agreement providing a specific expedited[20] procedure for resolution of disputes can, simply because of the mistake of a union over whom it exercised no control, be forced years later to litigate highly questionable claims of contract violation in an entirely different forum, with the final result being that the company is forced to make restitution of all damages suffered during the intervening period. The absurdity of this result is heightened by the Court's agreement that, had the dispute resolution procedure been timely effectuated by the offending party, it is unlikely that any of the Plaintiffs would have recovered—a conclusion fully borne out by the fact that this is precisely what happened to Plaintiff Elsie Lugo Bernier.

3. The Court of Appeals Treatment of the Statute of Limitations Issue Raises Significant and Important Questions of National Labor Policy.

As already noted, this Court has repeatedly stated that national labor policy favors resort to contractually agreed upon grievance procedures, uniformity and the speedy disposition of labor disputes. *See, e.g., John Wiley & Sons, Inc.* v. *Livingston, supra; Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U. S. 448 (1957); *International Union, UAW* v. *Hoosier Cardinal Corp.*, 383 U. S. 696 (1966). The Court of Appeals decision in this case, holding that the statute of limitations for a Union's breach of its duty of fair representation is different than for an Employer's breach of contract, runs counter to each of these three articulated goals of national labor policy.

As *Vaca* v. *Sipes, supra*, indicates, in actions such as the

20. The contract in issue here provided that grievances protesting termination had to be brought to the Company within three days following such action (JA 310).

one presented, the Union's and the Company's liabilities though separate, are inextricably bound and stem from "a single injury." Given then this intricate and interdependent relationship between the liability of Company and Union, it would be anomalous to have different statutes of limitation applied.

Not only would it be anomalous, such a result could seriously undermine the pervasive federal labor policy favoring arbitration as the exclusive means for resolving disputes arising under collective bargaining agreements. *See, e.g., United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960). In situations where a union would be subject to a shorter statute of limitations period than an employer, as the Court of Appeals here found, and where it was presented with grievances that it would prefer a jury rather than an arbitrator to decide, all the union would have to do is "arbitrarily" refuse to process the grievances, have the employees bring the suit after the union's statutory limitation period has run and have the jury, as in this case, decide the contract question in a § 301 action. Such a ploy would be an effective way for a union, without risk of liability (for the Court of Appeals here rejected any damages against the Union) to subvert the arbitrator's favored role in providing final and binding resolution of collective bargaining contract disputes.[21]

Moreover, as indicated in Appendix G, over two-thirds of the jurisdictions covered by the National Labor Relations Act, have tort statutes of limitations far shorter than those applicable to actions based on either written or unwritten

21. The *quid pro quo* for the employee in such circumstances, which the First Circuit found "difficult to see," is apparent in this very case. Surely an employee of a large public utility might reasonably anticipate that he would fare better before a sympathetic jury than before an expert labor arbitrator in what the Court itself characterized as a close question of contract violation.

contracts. And so the danger posed by different statutes of limitations is very real. There is thus a need for uniformity here. As this Court noted in *Hoosier Cardinal*, 383 U. S. at 702:

> "The need for uniformity, then, is greatest where its absence would threaten the smooth functioning of those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective agreement and the private settlement of disputes under it."

The Court of Appeals noted this problem but held that it was up to Congress to enact a statute of limitations. In so holding, the Court abrogated its function of fashioning federal law consistent with national labor policy mandated by this Court's decision in *Lincoln Mills*, *supra*.

Further, given such insulation from liability, unions are encouraged not to process grievances, or to process them with an eye toward the statute of limitations. Such a result is at odds with the aim, articulated in *John Wiley*, 376 U. S. at 558, "of a speedy arbitrated settlement of the dispute."

Given all this, it is submitted that the only appropriate limitation periods for the contractual claim here are either the six-month period under § 10(b) of the NLRA, or the one-year period applicable to the Union. As for the former, since breach of a union's duty of fair representation is also an unfair labor practice, *Vaca* v. *Sipes*, *supra*, the six-month limitations period would prevent forum shopping by Plaintiffs and encourage the speedy disposition of such claims. And since, as noted previously, the question of breach of contract is intricately connected to the fair representation issue, and different limitations periods would seriously undermine national labor policy, the six-month period should also apply to the contractual claim. This result is particularly appropriate in light of recent NLRB

decisions indicating that, in passing upon claims of breach of duty of fair representation, the Board will also decide the merits of the underlying contract claim. *See, e.g., Local 485, I. U. E.*, 170 NLRB No. 121 (1968), 183 NLRB No. 131 (1970).

Alternatively, the same state limitations period should apply to both the Union and the Employer. Singularly inappropriate, however, is the statute of limitations period in this case which allow Plaintiffs over 14 years and 11 months to notify the Company, which has been willing to abide by the grievance procedure, of their contractual claims.

CONCLUSION.

For the foregoing reasons, Petitioner respectfully submits that its petition for a writ of certiorari be granted.

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